

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2009-053747

07/31/2012

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
B. Lambert
Deputy

IN RE THE MATTER OF
JIMMY R LOPEZ

JOSEPH E COLLINS

AND

LAURA E BATTAGLIA

DAVID LEE GOLDFARB

UNDER ADVISEMENT RULING

RELOCATION

The Evidentiary Hearing in this matter was conducted on July 23, 2012. During the proceedings, the Court heard from the witnesses, including the parties. The Court has since considered the evidence, including the demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments.

After significant deliberation, the Court makes the following findings and enters the following orders:

The existing custody related orders were entered on October 11, 2011. Under those orders, there is an award of joint legal custody with Mother designated primary residential parent. Father currently has parenting time every other weekend from Friday at 6:00 p.m. to Monday at 7 a.m. and every Tuesday from 6:00 p.m. to Wednesday at 7:00 a.m. He does not exercise his Tuesday visitation and ends his weekend visitation on Sunday night at 6 p.m.

Mother proposes moving to East Palestine, Ohio with Sawyer. The move would make the current orders unworkable, in whole or in part. The Court, therefore, must review the existing orders.

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Jurisdictional Findings

THE COURT FINDS that Mother and Father have one minor child in common: Sawyer Jaydon Zuch Lopez (born August 20, 1999). The parties and the minor child have resided in Arizona continuously since the birth of the minor child. This Court, therefore, has jurisdiction as Arizona is the “home state” of the minor child. *See* A.R.S. § 25-1031.

Best Interests: A.R.S. § 25-408

Analysis of the relocation issue is statutorily controlled. *See* A.R.S. § 25-408. Because Mother proposes moving to Ohio with Sawyer, Mother bears the burden of establishing that the relocation is in the child’s best interest. *See Pollock v. Pollock*, 181 Ariz. 275, 277, 869 P.2d. 633, 636 (1995) and A.R.S. § 25-408(G). If the Court approves the relocation, the Court must “make appropriate arrangements to ensure” that both parents continue to have a meaningful relationship with Sawyer. *See id.*

In evaluating Mother’s relocation request, this Court must consider the factors in A.R.S. § 25-408(I), which includes the custody factors under A.R.S. § 25-403. When weighing these factors, “no single factor is controlling” and all “should be weighed collectively.” *Pollock*, 181 Ariz. at 278, 869 P.2d at 636. The Court must make specific findings regarding the relevant factors and the Court’s reasons for deciding that relocation is or is not in the child’s best interests based on those findings. *See Owen v. Blackhawk*, 206 Ariz. 418, 421-22, ¶ 12, 79 P.3d 667, 670-71, ¶ 12 (Ct. App. 2003) (when findings weigh both in favor of and against relocation, trial court must explain its consideration of the applicable factors to show that the trial court did not focus too much attention on one relevant factor to the exclusion of other relevant factors).

Those factors, as well as the Court’s findings, are as follows:

1. *The factors prescribed under A.R.S. § 25-403, which are as follows:*

- *The wishes of the child's parent or parents as to custody.*

Mother wants to remain primary residential parent and continue to share joint custody of Father.

Father would like to have more equal parenting time with Sawyer than he currently has.

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- *The wishes of the child as to the custodian.*

Sawyer is too young to have any meaningful impact on the choice of custodian.

- *The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.*

Sawyer is bonded with both parents.

On Mother's side of the family he has an older sister with whom he has lived his entire life who is moving to East Palestine, Ohio whether or not Mother and Sawyer are permitted to relocate. He has an older brother with whom he talks on Face Time almost every day. His older brother is in the Navy and stationed in Goose Creek, South Carolina. He is bonded with his maternal grandmother who lives in and is mayor of East Palestine, Ohio. His uncle on his mother's side of the family lives in Ohio near East Palestine.

His paternal grandparents, his aunt and uncle on his father's side of the family, his three cousins and Father all live in Anthem, Arizona. He knows and is bonded with all his paternal relatives.

- *The child's adjustment to home, school and community.*

Sawyer is flourishing under the new parenting time schedule established by Judge Gordon on October 11, 2011. He is too young to attend school but is doing well at home and in childcare.

- *The mental and physical health of all individuals involved.*

Prior to Judge Gordon's orders of October 11, 2011, Sawyer struggled with weight gain and suffered from alopecia. His hair is now growing back and he has had good weight gain and is back in the 75th percentile for weight. (Exhibit 7).

There is no indication that either Mother or Father has any issues with mental or physical health.

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- *Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.*

Mother is more likely to allow Sawyer frequent and meaningful continuing contact with Father. She has given Father extra parenting time in the past, and has let Sawyer spend the night with paternal grandmother so Sawyer could talk to Father on Face Time while Father was in Indiana for a wrestling tournament.

Father failed to return Sawyer as scheduled on May 27, 2012. Mother contacted the police. The police called Father and told him to return the child at 7:00 a.m. on May 28, 2012. Mother had a third party present on Monday morning May 28, 2012 for the exchange at 7:00 a.m. Father did not return Sawyer at 7:00 a.m. Father did return Sawyer at 6:00 p.m. on May 28, 2012.

Judge Gordon found in his October 7, 2011 minute entry that Father had missed an exchange on September 19, 2010 and then lied to police about it.

- *Whether one parent, both parents, or neither parent has provided primary care of the child.*

Mother has provided primary care of Sawyer.

- *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.*

The parties have not reached an agreement regarding custody.

- *Whether a parent has complied with chapter 3, article 5 of this title.*

The domestic relations education provisions of A.R.S. § 25-352 have been satisfied.

- *Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.*

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Neither party has been convicted of an act of false reporting of child abuse or neglect under A.R.S. §13-2907.02.

- *In addition to the foregoing, the Court must also consider any history of domestic violence (A.R.S. § 25-403(E) and 25-403.03), any drug related offenses of either party (A.R.S. § 25-403.04) and any sexual offenses (A.R.S. § 25-403.05).*

There are relevant allegations that require further consideration.

As found by Judge Gordon in his October 11, 2011 ruling, Father and his brother-in-law filmed exchanges causing disruptions.

Mother has an Order of Protection against Father that was upheld after a lengthy hearing. After hearing it was ordered that because of problems at exchanges, Father is not allowed to be present at any exchanges of the minor child and Mother must receive notes of and approve all persons at the exchanges.

2. Whether the relocation is being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child.

The request for relocation is being made in good faith. Should Mother be allowed to relocate, Father will have more access with Sawyer than the time he currently is able to use. Mother has offered to make Sawyer available to Father for extended periods of time when he is not teaching high school and coaching wrestling including summer vacation, Spring break and holiday access.

Father opposes relocation although he does not utilize all parenting time available to him under the current court order. In addition to not exercising all available parenting time, he does not utilize daily phone contact he has available with Sawyer. Mother had to remind Father of his summer parenting time with Sawyer this summer. He missed the first two days of that parenting time.

3. The prospective advantage of the move for improving the general quality of life for the custodial parent or for the child.

Mother's cost of living would be much lower in Ohio. The average price of a house is \$59,000.00 in East Palestine, Ohio compared to the much higher cost of a home in the metropolitan Phoenix area. Rent would be \$500.00 to \$800.00 as opposed to the \$1500.00 she currently pays in Phoenix. She has been approved for licensing as a registered nurse in both Ohio and Pennsylvania.

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She has received a job offer from Maxim Staffing Solutions for a position to begin in mid- August. She would have a permanent position through a registry and receive \$26.00-\$33.00 dollars an hour. She currently earns \$36.00 per hour, but the lower cost of living in East Palestine, Ohio more than makes up for the pay differential. In addition, she would continue to supplement her income by teaching Advanced Cardiac Life Support and Basic CPR.

There are medical centers within a 20 to 25 minute drive from East Palestine, Ohio. Mother hopes to be hired for the Allegany branch of Beaver Medical Center. There is also a medical center in Newcastle which is close to East Palestine. If she can't be placed in those facilities, she can drive further to the outskirts of Pittsburgh to work.

Once her daughter moves to East Palestine, Mother will have no relatives in the Phoenix area. Her mother, brother and daughter will all be in or near East Palestine. One niece lives about one-half hour away in East Salem. Another niece and nephew live in East Palestine. She has friends from high school in East Palestine. Her son is stationed with the Navy in South Carolina. She would be much closer to him in Ohio than she is in Arizona.

Mother feels the conflict between Mother and Father will be lessened if there are fewer exchanges and more distance between them. The litigation has been volatile. Father has called the police 57 times for well checks. He has made accusations to C.P.S. Mother had to move to obtain a protected address. Mother and Father have had three parenting coordinators. As found by the Court in its July 19, 2012 minute entry and testified to by Carnival Cruise employees at hearing, Father caused Mother to lose a job offer with Carnival Cruise Lines which would have resulted in a significant pay increase of \$40,000.00 in June 2012 by contacting Carnival Cruise Lines on several occasions. The parties are required to exchange a log book for Sawyer at exchanges. Father has crossed out or torn out pages in the past. In the new log book obtained because the last one was full, on July 13, 2012, Father crossed out Zuch from Sawyer's name although Judge Gordon ordered that the word Zuch was part of Sawyer's legal name.

Both Mother and Father testified that it seems to them that they have been in court every month on one issue or another. Mother currently owes \$26,000.00 in attorneys' fees.

Mother feels Sawyer will thrive with relocation. She and her mother testified that the East Palestine, Ohio is a wonderful place to raise children. The schools are highly rated and have small classes. There are summer activities children at the library including a reading camp, and the park has summer programs for children beginning at age 5.

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4. *The likelihood that the parent with whom the child will reside after the relocation will comply with parenting time orders.*

The court finds that Mother is likely to comply with parenting time orders. She has complied with all court orders in the litigation to date.

5. *Whether the relocation will allow a realistic opportunity for parenting time with each parent.*

Relocation would offer Father more parenting time that would be coordinated with his teaching schedule and his wrestling coaching schedule to provide time with Sawyer when he on vacation or break.

6. *The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child.*

Sawyer has now regained weight and is no longer suffering from alopecia since the access schedule was changed in October 2011. Judge Gordon, in his October 11, 2011 minute entry, placed much of the blame for the continuing hostility between Mother and Father on Father. Fewer exchanges and less hostility will positively affect Sawyer's emotional and physical health.

Relocation offers Sawyer an opportunity to spend more uninterrupted time with Father when Father is on summer vacation or other school breaks as well as lessening the number of exchanges.

7. *The motives of the parents and the validity of the reasons given for moving or opposing the move including the extent to which either parent may intend to gain a financial advantage regarding continuing child support obligations.*

The Court finds no evidence that either party intends to gain a financial advantage regarding continuing child support obligations by moving or opposing the move.

8. *The potential effect of relocation on the child's stability.*

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The Court finds that relocation would not adversely affect the stability of Sawyer. Both parents have testified in previous hearings that they thought fewer exchanges would benefit Sawyer.

THE COURT FINDS that given all the factors noted above, Mother has met her burden of showing that moving to East Palestine, Ohio with Sawyer is in the child's best interests.

IT IS THEREFORE ORDERED granting Mother's request to have Sawyer live with Mother in East Palestine, Ohio.

Custody Terms

All custody terms remain as set forth in Judge Gordon's ruling of October 7, 2011. Mother remains primary residential parent.

Parenting Time

As a term of the overall custody orders, parenting time shall be exercised as follows:

Regular Access-

During the school year, to the extent he is able to do so, Father shall have liberal access to Sawyer in East Palestine, Ohio on 48 hours advance notice.

Father shall have week on/week off parenting time with Sawyer during his summer vacation. Father's summer vacation is defined as the Sunday after the teachers' last day of school until the Sunday before the teachers must return to school to resume their duties at school. Each week begins Sunday at noon and ends the following Sunday at noon.

Father shall have his school spring break with Sawyer every year. Spring break shall begin at noon on the Saturday before the break in the school calendar and shall end on the Sunday preceding the resumption of school at noon.

Should his school implement a week- long fall break into its schedule in the future, Father shall have his school fall break with Sawyer every year. Fall break schedule, if implemented, would be from noon on the Saturday preceding the break to noon on Sunday preceding the day school resumes.

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Father continues to have access to Sawyer daily by telephone as ordered by Judge Gordon. If he wishes to do so and makes prior arrangements to do so that are compatible with the schedule of Mother and Sawyer, he may substitute Face Time contact with Sawyer for telephonic contact with Sawyer.

Holiday Schedule-

The parent who has Sawyer during the week of the 4th of July shall have the 4th of July holiday.

Mother will have Thanksgiving in even years. Father will have Thanksgiving in odd years. Thanksgiving shall be defined as the Wednesday before Thanksgiving at 6:00 p.m. to the Sunday after Thanksgiving at 12:00 p.m.

Father shall have one week of the December holiday vacation. Father shall have the week of Christmas in even years. Mother shall have the week of Christmas in odd years. Each week begins Sunday at noon and ends the following Sunday at noon.

Easter will be with Father as described in the school spring break schedule if Easter falls within Father's spring break. Otherwise Easter will be with Mother

Summer/Vacation-

Summer/Vacation is as defined above.

IT IS ORDERED that the parties shall share transportation costs in allocation to their respective incomes.

IT IS ORDERED that all exchanges shall take place at Sky Harbor International Airport at the terminal in which the child is arriving or the terminal from which the child will be departing. It is ordered that either Mother or Father shall accompany Sawyer on all flights until he is old enough to travel unaccompanied.

ATTORNEY FEES AND COSTS

Mother has requested an award of attorney fees and costs. An award of attorney fees and costs is governed by A.R.S. § 25-324. Section 25-324 provides as follows:

- A. The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions

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each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceedings under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions. The court may make these findings before, during or after the issuance of a fee award.

B. If the court determines that a party filed a petition under one of the following circumstances, the court shall award reasonable costs and attorney fees to the other party:

1. The petition was not filed in good faith.
2. The petition was not grounded in fact or based on law.
3. The petition was filed for an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party.

C. For the purpose of this section, costs and expenses may include attorney fees, deposition costs and other reasonableness expenses as the court finds necessary to the full and proper presentation of the action, including any appeal.

D. The court may order all amounts paid directly to the attorney, who may enforce the order in the attorney's name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

THE COURT FINDS that there is no substantial disparity of financial resources between the parties.

THE COURT FURTHER FINDS that Father did not act unreasonably in the litigation.

THE COURT FURTHER FINDS that the provisions of A.R.S. § 25-324(B) do not apply

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IT IS THEREFORE ORDERED denying Mother's request for attorney fees and costs.

FILED: Exhibit Worksheet and Exhibit Release Form(s)

All parties representing themselves must keep the Court updated with address changes.
A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.